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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 923

HOLLYWOOD BRANDS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion and judgment of the court of appeals (Pet. 23) is reported at 324 F. 2d 956, and its *per curiam* opinion denying petitioner's application for rehearing (Pet. 23), is reported at 326 F. 2d 400. The Board's decision and order (Pet. 59–62, 25–54; R. 29–71) [1] are reported at 142 NLRB No. 25.

[1] "R." refers to the "Mimeographed Record"; "P.A." refers to the exhibits included at the end of the Company's brief in the court below; "B.A." refers to the portions of the testimony and exhibits printed in a separate appendix to the Board's brief in the court below. These materials are on file with the Clerk of the Court.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1963, and the application for rehearing was denied on January 29, 1964 (Pet. 23). A decree (Pet. 23–24) was entered on February 7, 1964. The petition for a writ of certiorari was filed on March 17, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, by refusing to bargain in good faith on contract changes proposed by the union, by refusing to furnish pertinent wage information, and by unilaterally granting a wage increase.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix, *infra*, p. 13.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. THE COMPANY'S REFUSAL TO NEGOTIATE IN GOOD FAITH ON THE UNION'S PROPOSED CONTRACT CHANGES

The Company's headquarters are located in Centralia, Illinois, where it has a plant which is engaged in the manufacture of candy. It opened another candy plant in Montgomery, Alabama, in 1947. On

May 12, 1960, the Union [2] was certified, after a Board-conducted election, as the exclusive bargaining representative of the production and maintenance employees at the Montgomery plant (R. 38; B.A. 19). On April 24, 1961, the Company and the Union executed a contract effective until October 15, 1961 (R. 38–46; B.A. 18). On September 15, 1961, the Union notified the Company that it desired to reopen and make changes in the contract. On October 25, 1961, the Union requested negotiations on an arbitration clause; a seniority and better working conditions clause; job classifications; a three-day notice before changing work schedules; and wage increases (R. 46; B.A. 73–74, 17). On October 27, 1961, the Company's attorney, Fred S. Ball, Jr., posted a letter to the Union stating in part (R. 47):

> With reference to the five proposals for discussion in the meeting, it would only be fair for me to tell you now that the company is not willing to agree to any of these five items.
>
> If you want to propose a new contract for a period of one year identical with the one which has expired, that could be done without the necessity of a meeting.
>
> I realize that it is the duty of the company to meet and negotiate and am willing to do so, but at the same time it seems to me that it would be a waste of your time as well as ours to meet for the purpose of discussing the five points, none of which are agreeable to the com-

[2] Retail, Wholesale and Department Store Union, AFL-CIO, and its agency subdivision, United Bakery & Confectionery Workers Local 441-B.

pany. However, if you insist upon meeting it will have to be at a date later than next week * * *.

Attorney Ball and Personnel Director Helms met with Union negotiators on November 19, 1961, January 23, 1962, and April 17, 1962. At the first meeting on November 19, 1961, Ball rejected the Union's requests for an arbitration clause and a general pay increase. He stated that the Company was giving as much notice as possible before changing work schedules but refused to include in the contract any provision requiring the giving of notice; and, though agreeing to discuss with the plant manager a change in the Company rule whereby an employee lost seniority upon returning to work after an extended illness, he declared that he was "not going to agree to put that into the contract" (R. 48–50; B.A. 36). As the meeting ended, Ball summarized the Company's position as follows: "We have worked under a contract now that we have had, and it has proven to be one that has worked out all right, and I think it is good enough like it is; and I hope you all will decide to let well-enough alone" (R. 50; P.A. 7).

At the second meeting on January 23, 1962, after again refusing to make any changes whatever in the old contract, Ball said: "I'm just hoping that you will drop me a note and say 'dear Mr. Ball, please rewrite the contract as to 5 October,' and send it to me, and we'll get it signed up" (R. 50–51). At the final meeting on April 17, 1962, International Representative John L. Parker appeared as chief negotiator for the Union. The Union submitted comprehensive

contract proposals in writing respecting the arbitration of grievances, seniority, sick leave, changes in work schedules, and holiday and vacation pay (R. 51–57). Ball rejected all proposed contract changes, stating, "* * * I wrote you a letter and told you that we are not willing to make any changes in the contract but you said you wanted to meet and so we are here. But I mean, that doesn't change our position" (R. 58–59; B.A. 41, 61).

2. THE COMPANY'S REFUSAL TO FURNISH PERTINENT WAGE DATA TO THE UNION

At the first meeting on November 19, 1961, the Union requested a general wage increase of 25 cents an hour. Attorney Ball said it was Company policy to follow the wage rates paid at the main plant in Centralia and therefore "we couldn't even think about a pay raise, because as I understand it, we do keep the two companies in the same pay scale" (R. 50). At the April 17, 1962 meeting, International Representative Parker said the Union was willing to leave the amount of a general wage increase up to the Company but believed that there were inequities in the wage structure at the Montgomery plant. Ball replied that the Montgomery employees were paid the same wages as the Centralia employees and that they would not get a raise before the Centralia employees were given one (R. 31, n. 2; B.A. 66–67). Parker then asked permission for the Union "to look at the books to determine what the parallel wages are" (Pet. 64; B.A. 69). Ball commented: "Let's see now, what you want. You want to look at the [Centralia]

pay records * * * and you want to look at the [Montgomery] pay records * * * to verify the fact that they've got the same pay?" (Pet. 65; B.A. 70). Ball agreed to let Parker know "within a few days whether we are obligated to let [the Union] see those records." He then asked, "Will you go to Centralia just to look at the records?" Parker answered affirmatively (B.A. 71–72). By letter dated April 19, 1962, Ball advised Parker that he did not believe the Union had a right to see the Company records and therefore that the Company "declines to allow you to examine the records at Centralia."[*]

3. THE UNILATERAL WAGE INCREASE

On July 9, 1962, Ball notified Parker by letter that the Centralia plant employees had been given a three percent wage increase that day and that the Company intended to put the same increase into effect at the Montgomery plant. He asked Parker to reply by July 16, "stating any grounds of objection you may have to this proposed increase" (Pet. 70–71). By letter dated July 17, Parker advised Ball that he had returned to his office after a week's absence, that the Union was registering its objection to the three percent wage increase "as of this writing," and that "[we] would appreciate the opportunity to sit down with you and the company to ascertain if this is an equitable amount and in what manner this increase will be distributed." Parker ended his letter with a request for "the earliest date you have avail-

[*] The text of this letter is set forth at pages 66–67 of the petition.

able for this meeting" (Pet. 71–72). Ball replied on July 18 that the Union had failed to give any reason why the Company should not continue its previous policy of giving wage increases in Montgomery when they are given at the Centralia plant. He made no mention of Parker's request for a meeting (B.A. 82–83). On July 19, Parker replied that the Union had no objection to the wage increase as such, but, as the Union was the employees' bargaining representative, it had the right to help determine the manner in which the wage increase would be applied. Parker again advised Ball that the Union would like to have another meeting in order to discuss the proposed wage increase (R. 64–65; B.A. 83–84). To this Ball replied, "In your letter of the 19th you state that you have no objection to the increase. Are we to understand that you are withdrawing your protest?" (B.A. 85). On July 24, Parker wrote Ball, "we are for the fourth time telling you that we object to the increase of 3 percent for the employees at Hollywood Brands, Inc. Please let me know what dates you will be available to discuss this matter" (B.A. 86). On July 27, Ball advised Parker (B.A. 87–88):

> In your letter you ask for the dates I will be available to discuss this matter. If by that you mean the matter of this increase, I do not see anything to discuss in view of the fact that the increase has already been put into effect. If you want to discuss a further wage increase, I will, of course, meet with you and listen to you, but I must tell you in advance

> that this is all the increase the company is going to give at this time. If you want to meet and discuss taking this increase away from the employees, that would also be useless as the company would not be willing to do that.

The employees received the increase in their next paychecks.

B. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board concluded (Pet. 59–60, 50–52) that the Company violated Section 8(a)(5) and (1) of the Act (App., *infra*, p. 13) by refusing to bargain in good faith with the Union over the terms of a new contract, by refusing to furnish relevant wage data respecting the Centralia, Illinois, plant,[4] and by unilaterally granting a wage increase to its employees.

The Board's order (Pet. 60–62; 55–58) requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act (29 U.S.C. 157). Affirmatively, the Board's order requires the Company, upon request, to bargain with the Union in good faith, to furnish and make available to the Union payroll data and other records pertinent to wage rates and job classifications at both the Montgomery and Centralia plants, and to post an appropriate notice.

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[4] One Board member dissented from this finding (Pet. 60, n. 1).

C. THE COURT OF APPEALS DECISION

Finding ample support in the record for the Board's findings, the court below, in a *per curiam* opinion, enforced the Board's order (Pet. 23).

ARGUMENT

As the court below stated in denying petitioner's request for rehearing, "The law concerning all three questions [raised by petitioner] is so well settled as not to justify further discussion. The only debatable question concerns the Board's factual inferences and findings which, in our opinion, are supported by substantial evidence in the record" (Pet. 23). Such evidentiary issues do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, the conclusion of the court below is clearly correct.

1. Petitioner contends (Pet. 14-16) that it fulfilled its statutory obligation to bargain with the Union because it met with the Union, discussed the Union's contract proposals and offered to renew its previous contract with the Union. It argues that to find it guilty of a refusal to bargain in these circumstances is in effect to require it to agree to the Union's proposals, contrary to Section 8(d) of the Act (App., *infra*, p. 13), which provides that the bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession * * *." This contention, however, presupposes that petitioner entered "into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." *National Labor Relations*

Board v. *Herman Sausage Co.*, 275 F. 2d 229, 231–232 (C.A. 5).[5]

The Board and the court of appeals were fully justified in concluding that petitioner did not do so here—that on the contrary, it "entered into negotiations for a new contract with a predetermination to renew the expiring contract in its exact terminology and language, and to make no deviation from that position whatever" (R. 65; Pet. 50). This constitutes a refusal to bargain. Thus, as shown, pp. 3–5, *supra*, before negotiations began, the Company told the Union that it would accept a new one-year contract "identical with the one which has expired," but that it considered discussion of the Union's proposed changes "a waste of your time as well as ours." The Company thereafter met with the Union three times but repeated at each meeting that it would only accept a renewal of the old contract, and even rejected changes which it conceded were reasonable. Company Negotiator Ball, in rejecting all of the Union's proposals at the end of the third bargaining session, summed up its intransigent attitude in these words: "I wrote you a letter and told you that we are not willing to make any changes in the contract but you said you wanted to meet and so we are here. But * * * that doesn't change our position."

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[5] *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, relied on by petitioner (Pet. 12–14), is not to the contrary. Although finding that the negotiations there were conducted in good faith, the Court specifically noted that "performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences" (p. 402).

2. Petitioner's contention that it was never asked for information about the wages paid at its Centralia plant (Pet. 17) is contrary to the record. As shown pp. 5–6, *supra*, when Ball stated that the Montgomery employees were paid the same wages as the Centralia employees and would not get a wage increase before the latter did (thereby making the Centralia wage structure relevant to the Montgomery negotiations), Union Negotiator Parker asked permission for the Union "to look at the books to determine what the parallel wages are." Ball clearly interpreted this as a request for wage data at Centralia, for he stated: "Let's see now, what you want. You want to look at the [Centralia] pay records * * * and you want to look at the [Montgomery] pay records * * * to verify the fact that they've got the same pay?" Petitioner's contention that it is obliged to furnish "information" but not "records" (Pet. 17) is frivolous. A bare statement of what the wage rates were at Centralia, without any means of enabling the Union to verify those rates or to determine the manner in which they were computed and the job classifications to which they related, would have been of little value. As the Court has observed in a related connection: "If such an argument [here, that wages in the two plants were parallel] is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *National Labor Relations Board* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 152–153.

3. Petitioner's contention (Pet. 17–20) that it consulted with the Union before granting the wage in-

crease is belied by the record. Petitioner, without first discussing the matter with the Union, notified the Union that it was planning to put a three percent wage increase into effect. Although it afforded the Union an opportunity to "object," this was only a token gesture. For it refused all of the Union's requests to arrange a meeting to discuss the increase (pp. 6–8, *supra*). In these circumstances, there was clearly not the kind of negotiation with the bargaining representative contemplated by the Act. See *National Labor Relations Board* v. *Katz*, 369 U.S. 736. Nor can petitioner contend that the parties had reached a *bona fide* impasse (Pet. 18) which justified it in taking unilateral action, for any impasse was caused by the Company's prior unfair labor practices in refusing to bargain in good faith and to furnish relevant wage information. See *National Labor Relations Board* v. *Herman Sausage Co.*, 275 F. 2d 229, 234 (C.A. 5).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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April 1964.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *.
>
> * * * * *

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